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IN THE
Supreme Court of the United States
OCTOBER TERM, 1987

JOSE MARTINEZ HIGH,
Petitioner,

vs.

WALTER ZANT,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

HEATH A. WILKINS,
Petitioner,

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STATE OF MISSOURI

BRIEF FOR AMICUS CURIAE
AMNESTY INTERNATIONAL
IN SUPPORT OF PETITIONERS

(ATTORNEYS FOR AMICUS CURIAE
LISTED ON BACK OF FRONT COVER)

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BRIEF OF AMNESTY INTERNATIONAL
INTEREST OF AMICUS CURIAE

This brief is submitted amicus curiae by Amnesty International ("AI"), with the consent of the parties.¹

Amnesty International is an independent international human rights organization which (1) seeks the release of "prisoners of conscience" -- men and women detained anywhere because of their beliefs, color, sex, ethnic origin, language or religious creed, provided they have not used or advocated violence; (2) works for fair and prompt trials for all political prisoners and -on behalf of such people detained without charge or trial; and (3) opposes the death penalty and torture or other cruel inhuman or degrading

¹ The parties' letters of consent to the filing of this brief are being filed with the Clerk of the Court pursuant to Rule 36.2 of the Rules of this Court.

treatment or punishment of all prisoners without reservation. AI acts on the basis of the Universal Declaration of Human Rights and other international human rights instruments. Amnesty International opposes the death penalty unconditionally, believing it to be the ultimate cruel, inhuman and degrading punishment and a violation of the right to life, as proclaimed in the Universal Declaration and other international human rights instruments.

Amnesty International was founded in London in 1961 and now has sections in forty-four countries (in Africa, Asia, the Americas, Europe and the Middle East), including the United States, with more than 700,000 individual members, subscribers and supporters in 150 countries. There are more than 3,800 local AI groups in more than 60 countries

working in support of all aspects of AI's mandate. Since Amnesty International was founded AI groups have intervened on behalf of more than 25,000 prisoners in over a hundred countries with widely differing ideologies. In 1977, AI received the Nobel Prize for its work.

Amnesty International has formal consultative status, or similar formal relations, with the United Nations, UNESCO, the Organization of American States, the Council of Europe and the Organization of African Unity.

In February 1987, AI initiated a worldwide campaign urging states within the United States which retain the death penalty to abolish it. The campaign was based upon a 240-page report which discusses all aspects of the death penalty as implemented in the United States, including the execution of

juvenile offenders. United States of America: The Death Penalty, at 65-75 (February 1987).

Amnesty International does not approve of and would not defend any violent crime. However, AI regards the death penalty -- particularly as applied to crimes committed by juvenile offenders-- as cruel, inhuman and degrading treatment and incompatible with respect for the inherent dignity of the human person.²

With respect to the execution of juvenile offenders,³ there exists a well developed, unequivocal international

²Trop v. Dulles, 356 U.S. 86, 100 (1958) ("The basic concept underlying the Eighth Amendment is nothing less than the dignity of man.")

³ The term "juvenile," "child" or "juvenile offender" as used in this brief refers to a person who was under 18 at the time they committed their crime in accordance with the internationally recognized legal standards described in this brief.

legal and moral consensus prohibiting all nations from executing juvenile offenders for their crimes. However heinous the crime, the imposition on a young person of a sentence of utmost cruelty, which denies the possibility of rehabilitation or reform, is contrary to contemporary standards of justice and humane treatment in every corner of the world.

AI filed an amicus curiae brief last Term in Thompson v. Oklahoma. This brief is similar in substance to the brief filed in the Thompson case; however, it includes additional, updated information about international law and practices relating to the execution of juvenile offenders.

In the past two years AI has learned about a significant number of additional countries from different regions of the

world which have incorporated the prohibition against juvenile execution in their national legislation. These countries include Bahrain, Belize, Cuba, Ethiopia, Greece, Guinea, Kenya, Liberia, Malawi, Niger, Oman, Republic of China (Taiwan), Saudi Arabia, Sierra Leone, Swaziland, Syria, Tanzania, Yugoslavia and Zambia. Moreover, since AI filed its brief in the Thompson case in May 1987 the only reported executions of juvenile offenders are unconfirmed reports of such executions in Iraq on two occasions.

Hence, the evidence upon which AI's amicus curiae brief in the Thompson case was based is even more overwhelming in support of the international standard against juvenile execution at this time.

SUMMARY OF ARGUMENT

In this brief, Amnesty International,

based on its knowledge of national practices regarding the execution of juvenile offenders and its participation since 1961 as an observer in the development of international legal standards in this area, presents a summary of the massive evidence showing that there is a well established internationally recognized legal standard prohibiting the execution of juvenile offenders who were under 18 at the time of their crimes. This evidence includes widely ratified multilateral treaties and the laws and practices of almost all of the nations of the world.

The evidence of international consensus on this issue is overwhelming. Virtually every nation in the world, including the United States, has ratified treaties which prohibit the execution of juvenile offenders in some circumstances (e.g.,

during wartime). The majority of nations have ratified treaties which prohibit the execution of juvenile offenders in all circumstances. Even those countries which retain the death penalty have almost uniformly rejected the practice of juvenile execution as a violation of international standards of law and morality. There have also been numerous additional international expressions of the prohibition against the execution of juvenile offenders in the work of various international bodies. Moreover, the United States has been an active participant in these developments for decades and has never objected to the development of these internationally recognized legal standards prohibiting the execution of juvenile offenders.

Amnesty International hopes and expects that the body of internationally

recognized legal standards and opinion will be considered with great seriousness by this Court in determining whether the execution of Heath A. Wilkins or Jose Martinez High for crimes committed when they were below eighteen years of age, would violate the Eighth Amendment's prohibition against cruel and unusual punishment. The international community has achieved a consensus on this question which is highly relevant to this Court's Eighth Amendment analysis under Trop v. Dulles, 356 U.S. 86, 101 (1958), and its progeny. See, e.g., Gregg v. Georgia, 428 U.S. 153, 173 (1976) (Stewart, J., plurality opinion); Coker v. Georgia, 433 U.S. 584, 586 n. 10 (1977); Lockett v. Ohio, 438 U.S. 586, 604 (1978); Enmund v. Florida, 458 U.S. 782, 796 n.22 (1982).

In Thompson v. Oklahoma, ___ U.S. ___,

108 S.Ct. 2687 (1988), a plurality of this Court found that the international consensus prohibiting the execution of juvenile offenders supported the growing consensus in the United States against this practice in the context of a person who was 15 at the time of his crime. 108 S.Ct. at 2689, 2696. The same international standard supports the conclusion that the execution of persons who were 16 or 17 at the time of their crimes is cruel and unusual punishment.

In the past decade only a handful of juvenile offenders have been executed by governments in the world. Since 1979 out of the thousands of executions recorded by Amnesty International, only eight were reported to have been executions of juvenile offenders. These executions occurred only in Bangladesh, Barbados, Pakistan (two), Rwanda and the United

States (three). There have also been unconfirmed reports of executions of juvenile offenders in Iraq and Iran in recent years. Indeed, with the possible exception of unconfirmed juvenile executions in Iraq, there has been no recorded execution of a juvenile offender in the world since the execution of Jay Kelly Pinkerton in Texas on May 15, 1986. These "unusual" events stand against a nearly universal consensus of the international community that the execution of juvenile offenders violates internationally recognized legal standards and is offensive to contemporary international norms of moral decency.

The fact that the execution of juvenile offenders conflicts with internationally recognized legal standards deserves to be given particular weight in this Court's

constitutional analysis. It would be regrettable if constitutional guarantees under the United States Constitution were to be found to provide significantly less protection than the protection afforded by international norms on important issues of human rights and fundamental freedoms. The issue of whether juvenile offenders may be put to death is just such a fundamental human rights issue for the United States and for the international community. Amnesty International urges this Court to recognize the significance of the position taken by the international community on this issue by preventing the execution of Heath A. Wilkins and Jose Martinez High under the Eighth Amendment of the United States Constitution.

ARGUMENT

I.

INTERNATIONALLY RECOGNIZED LEGAL STANDARDS AND NATIONAL PRACTICES SUPPLY COMPELLING EVIDENCE THAT THE EXECUTION OF JUVENILE OFFENDERS CONSTITUTES CONSTITUTIONALLY PROSCRIBED CRUEL AND UNUSUAL PUNISHMENT

A.

This Court Has Looked to
Internationally Recognized Legal
Standards and the Practices of
Other Nations to Determine the
Meaning of "Cruel and Unusual
Punishment" Under the Eighth
Amendment

As this Court recognized in 1910, the Eighth Amendment prohibition against cruel and unusual punishment "is not fastened to the obsolete." Weems v. U.S., 217 U.S. 349, 378 (1910). A half-century later, this Court again emphasized that the Eighth Amendment "must derive its meaning from evolving standards of decency that mark the progress of a maturing society." Trop v.

Dulles, 356 U.S. 86, 101 (1958).

As befits a nation mindful of its place within the international community, the plurality opinion in Trop did not rely solely upon American society as its benchmark for determining "evolving standards of decency" for this purpose. In Trop, the fact that the overwhelming majority of nations did not employ denaturalization as a punishment for desertion was a significant factor in this Court's decision. Trop, supra, 356 U.S. at 102-03.

International standards are now an established aspect of Eighth Amendment analysis,⁴ particularly regarding limits on the use of executions as a penalty.

⁴See also, Lareau v. Manson, 507 F.Supp. 1177 (D.Conn. 1980), modified on different grounds, 651 F.2d 96 (2d Cir. 1981); Sterling v. Cupp, 20 Or. 611, 625 P.2d 123 (1981), for the application of this principle in a different context.

In Coker v. Georgia, 433 U.S. 584, 596 n. 10 (1977), for instance, this Court noted that as of 1965 only three major nations in the world retained the death penalty for rape. That international perspective informed the Coker decision that the imposition of the death penalty for the rape of an adult woman is "cruel and unusual" within the meaning of the Eighth Amendment. Id.

In Enmund v. Florida, 458 U.S. 782, 796 n. 22 (1982), this Court again turned toward the "climate of international opinion" as one basis for the determination that imposition of a death sentence upon a defendant who had not intended to kill is cruel and unusual punishment. Id. In Enmund this Court looked particularly to the practices of countries in Europe and of countries currently or formerly in the British

Commonwealth. Id.

In Thompson v. Oklahoma, supra, a plurality of this Court recognized the relevance of international standards and practices regarding the execution of juvenile offenders in interpreting the Eighth Amendment to prohibit the execution of an offender who was 15 at the time of his crime. 108 S.Ct. at 2696. The evidence of international standards and practices relied upon by the plurality in Thompson is equally compelling in the context of the execution of offenders who were 16 or 17 at the time of their crimes. The international community has clearly fixed the age of 18 as the dividing line between juvenile and adult offenders for the implementation of the death penalty.

As the plurality in Thompson recognized, the force of international

practice and opinion is even stronger against executions for crimes committed by juvenile offenders than it was for rapes (in Coker) or for unintended killings (in Enmund). The laws and practices of other nations as well as numerous international treaties, declarations and resolutions, demonstrate that evolving standards of decency of a maturing international community prohibit the execution of juvenile offenders, including the petitioners before the Court in these cases.

When this Court recognized nearly 30 years ago in Trop that the United States Constitution -- and in particular the Eighth Amendment -- cannot be interpreted in isolation from international legal standards and practices, the movement toward an international system for the protection of international human rights

was in its early stages. International human rights law has now become an established, essential and universally accepted part of the life of the international community. L. Henkin, Introduction, in "The International Bill of Rights," at 1 (1981). Individuals, including the people of the United States, are now understood to possess remediable rights based on international law. See, e.g., Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980).⁵

Justice Scalia's dissent in Thompson, 108 S.Ct. at 2711, criticized the reliance on international standards and practice for any purpose in the interpretation of the Eighth Amendment.

⁵ See generally, Henkin, International Law as Law in the United States, 82 Mich. L. Rev. 1555 (1984); See also Forti v. Suarez-Mason, 672 F.Supp. 1531 (N.D. Cal 1987).

This view appears to be at variance with the Eighth Amendment jurisprudence of this Court and with the history of the application of international law generally by United States courts.⁶

Some benchmark exterior to the challenged penal legislation itself must guide the interpretation of the Eighth Amendment if that provision is to have any enforceable meaning. Nothing in logic, history or the jurisprudence of this Court suggests that the practices and standards of the international

⁶ As the Second Circuit, echoing the words of this Court in The Paquete Habana, 175 U. S. 677, 700 (1900), emphasized in Filartiga v. Pena-Irala, supra:

[T]he law of nations forms an integral part of the common law, and a review of the history surrounding the adoption of the Constitution demonstrates that it became part of the common law of the United States upon the adoption of the Constitution. 630 F.2d at 886.

community must be ignored in framing that benchmark.

The text, history and jurisprudence of the Eighth Amendment are uniquely well suited to the consideration of evolving standards of decency around the globe. Even if it were the case that the United States would ignore international consensus where a conflict between international and domestic standards is clear, the issue before this Court does not present such a clear conflict. The execution of juvenile offenders appears to have only a tenuous hold on American society.⁷ Clearly, American society is

⁷ This is reflected by the fact that there has been only one death judgment involving a juvenile offender in the United States since early 1987. The only such sentence appears to be the death sentence imposed on Bernell Hegwood in Florida in 1988. Streib, "The Imposition of Death Sentences for Juvenile Offenders, January 1, 1982, Through June 24, 1988." (Unpublished Memorandum, June

moving toward the strong international consensus that already exists on this issue.

The United States has played an important role in fostering the development of international human rights law in the past half century.⁸ In particular, the United States participated, without protest, in the development over the past forty years of an international norm prohibiting the execution of juvenile offenders. See generally, Hartman, The Domestic Effects of International Norms Restricting the Application of the Death Penalty, 52 U.

24, 1988)

⁸ In the past 15 years Congress has incorporated international human rights standards in dozens of laws. This legislation is collected in Human Rights Documents: Compilation of Documents Pertaining to Human Rights, Committee on Foreign Affairs (September 1983), at 24-58.

Cinn. L. Rev. 655, 682-686 (1983).

It would be a matter of grave regret to the international community if the massive evidence of laws and practice throughout the world prohibiting executions for crimes committed by juvenile offenders and the treaties condemning such executions were to be ignored in the interpretation the Eighth Amendment of the United States Constitution in these cases. The global outcry against executions for crimes committed by juvenile offenders has risen to the strength of an internationally recognized standard which should be respected by the United States and all other countries in the world.

B. Internationally Recognized Legal Standards and National Practices Condemn the Punishment of Death for Crimes of Juvenile Offenders

In this section Amnesty International

presents the evidence that internationally recognized legal standards prohibit execution of juvenile offenders. Evidence of such standards, even emerging standards, is precisely the type of evidence entitled to persuasive weight under Trop, Coker, and Enmund and Thompson. Amnesty International urges this Court to give great weight in its Eighth Amendment analysis to the overwhelming consensus of international standards and practices on this issue.

1. National Laws and Practices

144 countries, including almost all Western European countries, either have abolished the death penalty for all offenses, or have forbidden it for ordinary criminal offenses, or have excluded it for certain offenders,

including juvenile offenders.⁹ Significantly, these nations range widely in political, regional and cultural diversity.

Thirty-four countries have completely abolished the death penalty. Twenty additional countries provide for the death penalty only for exceptional crimes such as crimes under military law, or for crimes committed under exceptional circumstances. Sixty-five of the countries which retain the death penalty for common crimes have statutory provisions recognizing juvenile offenders as exempt from the death

⁹ A list of all retentionist and abolitionist nations is included in the Appendix at A-1 through A-7. Retentionist countries that have prohibitions against the execution of juvenile offenders in their national legislation are identified in the Appendix at A-3 through A-7.

penalty.¹⁰

Twenty-five of the remaining sixty-one retentionist countries have ratified the International Covenant on Civil and Political Rights or the American Convention on Human Rights both of which prohibit the execution of persons who were under 18 at the time of their crimes. Thus, only thirty-six countries out of the 180 countries and territories listed in the Appendix have not formally abolished execution for juvenile offenders either in their national legislation or by ratifying a treaty prohibiting this practice. In the vast majority of these countries there has not been an execution of a juvenile offender for more than a decade. Only five

¹⁰ See Appendix, at A-3 to A-7. These statistics are taken from information in AI's files. See also, Hartman, supra, at 666 n. 44.

countries, with the possible addition of Iran and Iraq, have actually engaged in this universally condemned practice in the past decade. Significantly, the vast majority of countries which retain the death penalty have embraced the international consensus that the execution of juvenile offenders violates basic principles of humanity and decency in the international community.

In the United States 26 of 51 jurisdictions, including the District of Columbia, expressly prohibit the execution of juvenile offenders.¹¹ Thus, in more than half of U. S. jurisdictions the juvenile offenders before this Court would be ineligible for the death

¹¹ The information about death penalty legislation in U.S. jurisdictions is taken from footnotes 25, 26, 29 and 30 in Thompson. 108 S.Ct. at 2694-96.

penalty.

In 19 other jurisdictions there is no minimum age specified in the death penalty statute. Without such an explicit legislative judgment on this fundamental question it cannot be said that these states have deliberately chosen to reject the international standard prohibiting juvenile executions.

108 S. Ct. at 2706 (O'Connor, J., concurring). Only six jurisdictions have specifically set a minimum age for the death penalty which is contrary to the international standard described in this brief.¹²

The key point is that there does not appear to be a political consensus in the

¹² These six jurisdictions are Georgia (age 17), Indiana (age 16), Kentucky (age 16), Nebraska (age 16), North Carolina (age 17) and Texas (age 17). 108 S. Ct. at 2696 n.30.

United States in favor of the execution of juvenile offenders who were under 18 at the time of their crimes. In fact, the evidence strongly suggests a movement toward the international consensus in opposition to this practice. This growing consensus is underscored by the declarations of various representative American legal bodies, including the American Law Institute and the American Bar Association, which have publicly opposed the execution of juvenile offenders.¹³

¹³ American Law Institute Model Penal Code § 210.6 commentary at 133. (Official Draft and Revised Comments (1980) ("Civilized societies will not tolerate the spectacle of execution of children...") American Bar Association, summary of Action of the House of Delegates 17 (1983) Annual Meeting) ("Be it resolved, that the American Bar Association opposes, in principle, the imposition of capital punishment upon any person for any offense committed while under the age of eighteen (18).")

While some nations still retain the possibility of executing juvenile offenders in their laws, the actual practices of nations indicate that the execution of juvenile offenders is exceedingly rare. Although 81 nations reportedly performed executions between 1973 and 1982, only two juvenile offenders were reported to have been executed during that period.¹⁴ Moreover, the Secretary-General of the United Nations noted in 1973 that "[t]he great majority of Member States [of the United Nations] report never condemning to death

¹⁴ Hartman, supra, at 666-67 n. 44. This data is based on the reports of more than 70 nations to the United Nations for the period in question. In addition, one non-reporting country is known to have carried out the execution of a juvenile offender in 1982.

persons under 18 years of age."¹⁵

Amnesty International has collected data showing that since 1979 there have been more than 11,000 judicially sanctioned executions in over 80 countries; however, only eight persons who committed their offense while under the age of 18 were known to have been executed during that period. Five of these executions took place in: Pakistan (two), Barbados, Bangladesh and Rwanda (one each). The other three took place in the United States: Charles Rumbaugh (executed in Texas September 11, 1985, after dropping his final appeals), James Terry Roach (executed in South Carolina January 10, 1986) and Jay Pinkerton (executed in Texas May 15, 1986). There

¹⁵ United Nations Economic and Social Council, Report of the Secretary General on Capital Punishment at 10, U.N. Doc. E/5242 (1973).

are also unconfirmed reports of executions of juvenile offenders in Iraq and Iran. In the rest of the world, as in the United States,¹⁶ being put to death for a crime committed as a juvenile is indeed "cruel and unusual in the same way that being struck by lightning is cruel and unusual." Furman v. Georgia, 408 U.S. 238, 309 (1972) (Stewart, J., concurring).

2. Major Human Rights Treaties Prohibit The Execution of Juvenile Offenders

The repugnance around the world towards executions for crimes committed by children has elevated this question beyond national reform into the arena of international concern and action.

¹⁶ See Streib, Death Penalty for Juveniles, Indiana University Press, (1987), at 55-71. H. Bedau (ed.), the Death Penalty In America 52-56 (1964); J. Laurence, the History of Capital Punishment 16-18 (1960).

Numerous international treaties and resolutions, declarations and other international documents reflect the international consensus against execution of juvenile offenders who were under 18 at the time of their crime. See N. Rodley, The Treatment of Prisoners Under International Law at 186 (1987). At least three major human rights treaties explicitly prohibit the imposition of the death penalty on juvenile offenders who were under 18 at the time of their crimes.¹⁷

17 American Convention on Human Rights, O.A.S. Official Records, OEA/Ser. K/XVI 1.1, Doc. 65 Rev. 1 Corr. 2 (1970), Art. 4(5); International Covenant on Civil and Political Rights, Art. 6(5), Annex to G.A. Res. 2200, 21 U.N. GAOR Res. Supp. (No. 16) 53, U.N. Doc. A/6316 (1966); Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 3560, T.I.A.S. No. 3365, § 75 U.N.T.S. 287, Art. 68

Protocol No. 6 to the European

The United States has ratified one of these treaties and has signed the other two. The fact that the United States has not yet ratified either the International Covenant on Civil and Political Rights or the American Convention on Human Rights does not dilute the binding force of the norms in these treaties which are part of customary law. In fact, the assumption of the drafters of both of these human rights treaties was that the prohibition against juvenile execution embodied in the treaties was already an accepted international standard. See §§ b and c, infra.

Convention of Human Rights, ratified by ten nations and signed by all but six of the twenty-one Member States of the Council of Europe, abolishes the death penalty entirely for crimes during peacetime. Opened for signature April 23, 1983, 1983 Europ. T.S. No. 114, reprinted in 22 I.L.M. 539 (1983).

a. Fourth Geneva Convention

The almost universally ratified Fourth Geneva Convention of 1949, concerned with the protection of civilians in time of war, prohibits the execution of juvenile offenders in the context of war-- perhaps the most threatening period in any nation's existence. Article 68 of the Fourth Geneva Convention provides:

In any case, the death penalty may not be pronounced on a protected person who was under eighteen years of age at the time of the offense.¹⁸

The ratifying countries of the Geneva Convention -- 165 nations, including the United States -- virtually cover the

¹⁸The two additional Protocols to the Geneva Conventions of 1949, adopted in 1977, both rule out the death penalty for crimes committed by juvenile offenders. Geneva Protocol I Additional to the Geneva Conventions of August 12, 1949, and relating to the Protection of Victims of International Armed Conflicts, Article 76; Geneva Protocol II Additional to Geneva Conventions of August 12, 1949, and relating to the Protection of the Victims of Non-International Armed Conflicts, Article 6. The United States has signed both additional Protocols. In January, 1987, President Reagan announced that the United States would not ratify additional Protocol I; however, this action was taken for reasons other than the provisions of Article 76. Message From the President of the United States Transmitting the Protocol II Additional to the Geneva Conventions of August 12, 1949, and relating to the Protection of Victims of Non-international Armed Conflicts concluded at Geneva on June 10, 1977, 100th Cong., 1st Sess., Treaty Doc. 100-2 (1987).

globe.¹⁹ Thus, the United States has been a part of the development of the international norm against juvenile execution for nearly 40 years. If nearly all the nations of the world, including the United States, have agreed to prohibit the execution of juvenile offenders during periods of international armed conflict, this internationally recognized standard ought to apply with even greater force during peacetime.

b. International Covenant on Civil and Political Rights

Article 6(5) of the International Covenant on Civil and Political Rights, declares:

19 The only nations which have not ratified the Geneva Conventions are Bhutan, Brunei, Burma, Maldives and Nauru. Kiribati has also not ratified the Conventions but they remain applicable to it by virtue of a provisional declaration of application of the treaties.

Sentence of death shall not be imposed for crimes committed by persons below eighteen years of age and shall be not carried out on pregnant women.

Eighty-seven nations of the world, including most of the Western European countries and Canada, have ratified this Covenant. Another seven nations, including the United States, have signed it.²⁰

The debates surrounding the adoption of Article 6 of the International Covenant on Civil and Political Rights demonstrate that no opposition arose against the view that permitting executions of juvenile offenders was contrary to human rights principles.²¹ The travaux préparatoires reveal that the drafters of Article 6

20 The nations which have ratified or signed the Covenant are identified in the Appendix.

21 Hartman, supra, at 671-72.

believed that the prohibition against the execution of juvenile offenders represented a consensus of nations and never questioned the validity of this consensus.²²

In fact, the travaux make clear that the Article 6(5) prohibition was no more than the codification of an already existing binding norm.²³ The U.N. General Assembly resolution which recognized that Article 6 of the International Covenant constitutes a "minimum standard" for all Member States, not only ratifying states,²⁴ is further

22 Id. at 672 and n. 64, and citations noted therein.

23 Id.

24 Id. at 681 n. 94; G.A. Res. 35/172, U.N. GAOR Supp. (No. 48) at 195, U.N. Doc. A/35/48 (1980). Although the United States did not participate in the Article 6 debates, it did support this General Assembly resolution. Id. at 685, 684 n. 106, 681 n. 94.

evidence of State practice supporting the position that the prohibition against the execution of juvenile offenders is an internationally recognized legal standard.

c. American Convention on Human Rights

Article 4(5) of the American Convention on Human Rights²⁵ also prohibits the executions contemplated in these cases:

Capital punishment shall not be imposed upon persons who, at the time the crime was committed, were under 18 years of age or over 70 years of age; nor shall it be applied to pregnant women.²⁶

25 This treaty has been ratified by nineteen American States and signed by an additional three countries, including the United States. A list of nations which have ratified or signed the American Convention is included in the Appendix.

26 On March 27, 1987, the Inter-American Commission on Human Rights of the Organization of American States held that the United States violated Article 1 (right to life) and Article 2

The drafters of the American Convention, recognizing that total abolition of the death penalty was not possible in the context of the Convention, imposed important limitations on the use of executions, including the prohibition of the execution of juvenile

(prohibition of discrimination) of the American Declaration on the Rights and Duties of Man by permitting the execution of juvenile offenders. OAS IACHR Res. 3/87, Case No. 9647, (Roach and Pinkerton v. United States), OEA Ser. L/V/II 69, Doc. 17 (March 27, 1987). The Commission stated in dictum that there was a peremptory norm of international customary law prohibiting the execution of juvenile offenders. *Id.* at Para. 56. Although the Commission did not find that age 18 was the universally accepted dividing line between juvenile and adult offenders for this purpose, it did state that there was an "emerging" norm setting the age of 18 as the minimum age for the imposition of the death penalty. *Id.* at Para. 60. This decision did not address Article 4(5) of the American Convention because the United States has not yet ratified the Convention.

offenders.²⁷ Moreover, the draft proposal of Article 4(5) was patterned after the International Covenant's prohibition on the executions of juvenile offenders, thus demonstrating a belief that such a prohibition constituted the prevailing international standard.²⁸

The travaux of the American Convention indicate that the United States' delegation did not oppose per se the notion that the execution of juvenile

²⁷ Although the motion for total abolition of the death penalty did not carry, no vote was cast against it. T. Buergenthal & R. Norris, *Human Rights: The Inter-American System* (1982), at 248, Booklet 12. The Rapporteur noted that the drafters acted according to the "trend in the Americas toward eliminating [capital] punishment". Report of the Rapporteur of Committee I. *Id.* at 162. A number of delegations also expressed hostility toward any use of the death penalty. See Minutes, 3d Session of Committee I, *id.* at 36-38.

²⁸ See, Hartman, supra, at 672-73 n. 66, and the sources cited therein.

offenders should be prohibited. Rather the United States delegation appeared more concerned that setting specific age limits on the exercise of the death penalty did not adequately take into account the "already apparent" trend toward gradual abolition of the death penalty. The U.S. stated:

The proscription of capital punishment within arbitrary age limits presents various difficulties in law, and fails to take account of the general trend, already apparent, for the gradual abolition of the death penalty... For this reason we believe the text will be stronger and more effective if this paragraph is deleted. [Emphasis added.]

Observations and Proposed Amendments to the Draft of the Inter-American Convention on the Protection of Human Rights, T. Buergenthal and R. Norris, supra, Booklet 13, at 152.

d. These Treaties Reflect an International Consensus Against The Execution of Juvenile Offenders

The Fourth Geneva Convention, the International Covenant on Civil and Political Rights, and the American Convention, along with their travaux préparatoires provide strong evidence that there exists a high degree of consensus among a large number of nations that the execution of juvenile offenders is forbidden under international law.

Under both the International Covenant on Civil and Political Rights (Article 4(2)), and the American Convention on Human Rights (Article 27(2)), the prohibitions against the execution of juvenile offenders admit of no derogation

even during national emergencies.²⁹ The United States Government has ratified the Geneva Conventions and has signed but not

²⁹ Likewise, under Article 3 of Protocol No. 6 to the European Convention on Human Rights, no derogation from the Protocol is allowed nor may reservations in respect of the Protocol be made under its Article 4. Recently, the European Parliament passed a resolution (Doc. B 2-220/85) calling upon all Council of Europe and European Community Member States who had not yet adhered to the Protocol to do so as soon as possible. The resolution welcomed "the continuing trend towards abolition of the death penalty in Member States of the European Community" and noted that "the death penalty is a form of cruel, inhuman and degrading punishment and a violation of the right to life, even when scrupulous legal procedures are followed." Report on the abolition of the death penalty and accession to the Sixth Protocol of the Convention for the Protection of Human Rights and Fundamental Freedoms, 1985-86 Eur.Doc. A2-167/85 at 10 (1985). In September 1987 the European Community passed a resolution in which is expressed its "deep concern" that "in 26 states (of the United States) persons under 18 can be sentenced to death..." Resolution of the European Parliament, "Political Relations between the European Community and the United States," Eur. Doc. A2-105/87 (September 16, 1987), para 16 at 20.

yet ratified the two other conventions.³⁰ The fact that the United States has not yet ratified the Covenant or the American Convention does not in any way suggest that the United States is not bound by the norm prohibiting juvenile execution.

³⁰ President Carter sent the International Covenant and American Convention, and two other treaties, to the Senate for its advice and consent on February 23, 1978. Human Rights Treaties, President's Message to the Senate, 14 Weekly Comp. Pres. Doc. 395 (Feb. 27, 1978). Although the President proposed reservations to the American Convention and the International Covenant upon their transmittal to the Senate, the Administration noted that the reservations were intended simply to avoid criticisms and implementation difficulties and "certainly not the preservation of any right to execute children or pregnant women, something never done in the United States." Response by the Department of State to the "Critique of Reservations to the International Human Rights Covenants" by the Lawyers Committee for International Human Rights, International Human Rights Treaties: Hearings before the Committee on Foreign Relations, 96th Cong., 1st Sess. 1, 55 (1979), noted in Hartman, *supra*, at 685 and n. 112.

On the contrary, these treaty prohibitions provide important and authoritative evidence of the international consensus against the execution of juvenile offenders.

3. Repeated Actions by the United Nations Condemn The Execution of Juvenile Offenders

The actions of the United Nations provide further evidence of the norm prohibiting the execution of juvenile offenders. The U.N. Economic and Social Council (ECOSOC) has adopted, pursuant to a resolution, safeguards relating to the death penalty, one of which was a prohibition against the execution of persons who committed crimes below the age of 18 years. E.C.S. Res. 1984/50, U.N. ESCOR Supp. (No. 1) at 33, U.N. Doc. E/1984/84 (1984). The U.N. General Assembly has endorsed these safeguards and asked the Secretary-General "to

employ his best endeavors in cases where the safeguards . . . are violated." G.A. Resolution 39/118, U.N. Doc. A/39/51, at 211, Oper. paragraphs 2 and 5 (1984).

In September 1985, the Seventh United Nations Congress on the Prevention of Crime and Treatment of Offenders adopted Resolution No. 15, endorsing the ECOSOC safeguards and urging all states retaining the death penalty to implement them. The U.S. joined in the consensus on this resolution. Report of the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders (26 August to 6 September 1985) U.N. Doc. A/Conf.121/22 (1985), at 86-87. Indeed, the ECOSOC safeguards have become universally accepted minimum standards regarding the implementation of the death penalty.

Similarly, the U.N. Standard Minimum Rules for the Administration of Juvenile Justice ("The Beijing Rules"), also adopted by the Seventh Congress and the United Nations General Assembly without dissent by the United States, provide: "Capital punishment shall not be imposed for any crime committed by juveniles." G.A. Res 40/33, Nov. 29, 1985, Annex, rule 17.2.

These repeated expressions of the international consensus in opposition to the execution of juvenile offenders who were under 18 at the time of their crimes leaves no room for doubt about the international obligations of the United States on this fundamental issue. The members of the international community have an expectation that all countries, including the United States, will refrain from executing juvenile offenders even in

countries which retain the death penalty for adult offenders.

CONCLUSION

"Children have a very special place in life which law should reflect." May v. Anderson, 345 U.S. 528, 536 (1953) (Frankfurter, J., concurring), repeated in Eddings v. Oklahoma, 455 U.S. 104, 116 n. 12 (1982). As this Court emphasized in Eddings, "... youth is more than a chronological fact. It is a time and condition of life when a person may be most susceptible to influence and to psychological damage. This Court and state and federal legislatures throughout the United States have frequently recognized that minors, especially in their early years, generally are less mature and responsible than adults. Thompson, 108 S.Ct. at 2692-93. Particularly 'during the formative years

of childhood and adolescence, minors often lack the experience, perspective and judgment' expected of adults. Even the normal 16 year old customarily lacks the maturity of an adult." Id. at 116, citing Bellotti v. Baird, 443 U.S. 622 (1979).

Violent crime is a serious problem in nearly every nation. The universal truth of Justice Frankfurter's observation in May v. Anderson, however, is equally transcendent over national boundaries. With a handful of notorious exceptions, the laws, practices and treaties of the nations of the world reflect this truth by prohibiting the penalty of death for crimes committed by children.

These internationally recognized legal standards prohibiting the execution of juvenile offenders were developed in recognition of the fact that the death

penalty -- with its uniquely cruel and irreversible character -- is a particularly inappropriate penalty for individuals who have not attained full physical or emotional maturity at the time of their actions. Children and adolescents are widely recognized as being less responsible for their actions than adults, and more susceptible to rehabilitation, thus rendering the death penalty a particularly inhumane punishment in their cases. Criminologists have also noted that arguments used to support the death penalty are especially inapplicable in the case of young people. It is recognized that children and adolescents are more liable than adults to act on impulse, or under the influence or domination of others, with little thought for the long-term consequences of their

actions, and they are particularly unlikely to be deterred by the death penalty. Many young people who commit brutal crimes themselves come from brutalized and deprived backgrounds. To impose the death penalty in such cases, whether as retribution or as an intended deterrent, violates basic principles of humanity.

The Eighth Amendment of the Constitution of the United States offers a strong guarantee of basic human rights to the people of the United States in part because it cannot be interpreted in isolation from the human rights norms of the international community. The Eighth Amendment, like the laws, practices and treaties of the rest of the world, should be understood as prohibiting the killing of anyone as punishment for crimes committed as a child and thus should be

found to prohibit the execution of Heath A. Wilkins and Jose Martinez High. By so holding, this Court will reaffirm the essential role of the United States Constitution as the basic charter of a nation committed to respect for human rights.

The ruling in this case will matter not simply to these two young men, or to the handful of other juvenile offenders already sentenced to die in the United States, or even just to the people of the United States. In truth, the attention of the world at large will be justifiably concerned about United States' adherence to this widely accepted international standard. Though this Court's role is to expound a constitution applicable to persons within the United States, this Court has long recognized that "evolving standards of decency" in the world cannot

and should not be excluded from its constitutional analysis under the Eighth Amendment. "Evolving standards of decency" in the United States and throughout the world require that these death sentences be set aside.

DATED: September 3, 1988

Respectfully submitted,

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APPENDIX

APPENDIX

ABOLITIONIST AND RETENTIONIST
COUNTRIES (AS OF APRIL 1987)

August 1988

ABOLITIONIST BY LAW FOR ALL CRIMES

(Countries whose laws do not provide for
the death penalty for any crime)

| | AMER | ICCP** | CONV |
|--|------|--------|------|
|--|------|--------|------|

| | | | |
|--------------------------------|---|---|---|
| Australia | x | | |
| Austria | x | | |
| Cape Verde | | | |
| Colombia | x | x | |
| Costa Rica | x | x | |
| Denmark | x | | |
| Dominican Republic | x | x | |
| Ecuador | x | x | |
| Finland | x | | |
| Federal Republic of Germany | x | | |
| France | x | | |
| German Democratic Republic | | | |
| Haiti | | | x |

*Countries which have ratified or
acceded to the International Covenant on
Civil and Political Rights or the
American Convention on Human Rights are
noted by an "x" and countries which have
signed, but not ratified, these treaties
are noted by an "s."

| | <u>ICCPR</u> | <u>AMER CONV</u> |
|--|--------------|------------------|
|--|--------------|------------------|

| | | |
|---------------------|---|---|
| Holy See | | |
| Honduras | s | x |
| Iceland | x | |
| Kiribati | | |
| Lichtenstein | | |
| Luxembourg | x | |
| Marshall Islands | | |
| Micronesia | | |
| Monaco | | |
| Netherlands | x | |
| Nicaragua | x | x |
| Norway | x | |
| Panama | x | x |
| Philippines | x | |
| Portugal | x | |
| Solomon Islands | | |
| Sweden | x | |
| Tuvalu | | |
| Uruguay | x | x |
| Vanuatu | | |
| Venezuela | x | x |
| Total: 34 countries | | |

ABOLITIONIST BY LAW FOR ORDINARY CRIMES ONLY.

(Countries whose laws provide for the death penalty only for exceptional crimes such as crimes under military law or crimes committed in exceptional circumstances such as wartime)

| | | |
|-------------|---|---|
| Argentina | x | x |
| Bhutan | | |
| Brazil | | |
| Canada | x | |
| Cyprus | x | |
| El Salvador | x | x |

| | <u>ICCPR</u> | <u>AMER CONV</u> |
|--|--------------|------------------|
|--|--------------|------------------|

| | | |
|-----------------------|---|---|
| Fiji | | |
| Israel | s | |
| Italy | x | |
| Malta | | |
| Mexico | x | x |
| New Zealand | x | |
| Papua New Guinea | | |
| Peru | x | x |
| San Marino | x | |
| Sao Tome and Principe | | |
| Seychelles | | |
| Spain | | x |
| Switzerland | | |
| United Kingdom | | x |
| Total: 20 countries | | |

RETENTIONIST

(Countries and territories whose laws provide for the death penalty for ordinary crimes. However, some of these countries have not in practice carried out executions in recent years.)

*Countries marked with an * have not executed anyone for at least the last 10 years (and in some cases for decades) and may be considered abolitionist de facto. 27 countries and territories fall within this category.

**This column indicates countries which have prohibitions against the execution of juvenile offenders in their national legislation based on the most current information available to AI. This survey is not necessarily complete and other countries may also have such legislation.

| | <u>ICCPR</u> | <u>AMER CONV</u> | <u>JUV** PROHB</u> |
|---------------------------|--------------|------------------|--------------------|
| Afghanistan | x | | x |
| Albania | | | x |
| Algeria | s | | x |
| Andorra* | | | |
| Angola | | | x |
| Anguilla* | | | x |
| Antigua and Barbuda | | | x |
| Bahamas | | | x |
| Bahrain* | | | x |
| Bangladesh | | | |
| Barbados | x | x | |
| Belgium* | x | | |
| Belize | | | x |
| Benin | | | |
| Bermuda | | | |
| Bolivia* | x | x | |
| Botswana | | | x |
| British Virgin Islands* | | | |
| Brunei Darussalam* | | | x |
| Bulgaria | x | | x |
| Burkina Faso | | | |
| Burma | | | |
| Burundi | | | x |
| Cameroon | x | | x |
| Cayman Islands* | | | x |
| Central African Republic | x | | |
| Chad | | | |
| Chile | x | | s |
| China (People's Republic) | | | |
| Comoros* | | | |
| Congo | x | | |
| Cuba | | | x |
| Czechoslovakia | x | | x |

| | <u>ICCPR</u> | <u>AMER CONV</u> | <u>JUV** PROHB</u> |
|----------------------------|--------------|------------------|--------------------|
| Djibouti* | | | |
| Dominica | | | x |
| Egypt | | x | x |
| Equatorial Guinea | | | x |
| Ethiopia | | | |
| Gabon | | x | |
| Gambia* | | x | |
| Ghana | | | |
| Greece* | | | x |
| Grenada | | | x x |
| Guatemala | | | x |
| Guinea | | x | x |
| Guinea-Bissau | | | x |
| Guyana | | x | |
| Hong Kong* | | | |
| Hungary | | x | x |
| India | | x | |
| Indonesia | | | |
| Iran | | x | |
| Iraq | | x | |
| Ireland* | | s | |
| Ivory Coast* | | | |
| Jamaica | | x | x x |
| Japan | | x | x |
| Jordan | | x | x |
| Kampuchea | | x | |
| Kenya | | x | x |
| Korea (Dem. People's Rep.) | | | |
| [No. Korea] | | x | |
| Korea (Rep.) | | | |
| [So. Korea] | | | |
| Kuwait | | | x |
| Laos | | | |
| Lebanon | | x | |
| Lesotho | | | |
| Liberia | | s | x |

| | <u>ICCPR</u> | <u>AMER CONV</u> | <u>JUV** PROHB</u> |
|-------------------------------------|--------------|------------------|--------------------|
| Libya | x | | x |
| Madagascar* | x | | x |
| Malawi | | | x |
| Malaysia | | | |
| Maldives* | | | |
| Mali* | x | | x |
| Mauritania | | | |
| Mauritius | x | | |
| Mongolia | x | | x |
| Montserrat* | | | x |
| Morocco | x | | |
| Mozambique | | | |
| Namibia | | | |
| Nauru* | | | |
| Nepal | | | |
| Niger* | x | | x |
| Nigeria | | | |
| Oman | | | x |
| Pakistan | | | |
| Paraguay* | | s | x |
| Poland | x | | x |
| Qatar* | | | |
| Romania | x | | x |
| Rwanda | x | | |
| Saint Christopher and Nevis | | | x |
| Saint Lucia | | | x |
| Saint Vincent and the Grenadines | x | | x |
| Samoa* | | | x |
| Saudi Arabia | | | x |
| Senegal* | x | | |
| Sierra Leone | | | x |
| Singapore | | | |
| Somalia | | | |
| South Africa | | | |
| Sri Lanka* | x | | |
| Sudan | x | | |

| | <u>ICCPR</u> | <u>AMER CONV</u> | <u>JUV** PROHB</u> |
|--|--------------|------------------|--------------------|
| Suriname | x | x | |
| Swaziland | | | x |
| Syria | | x | x |
| Taiwan (Republic of China) | | | x |
| Tanzania | | x | x |
| Thailand | | | x |
| Togo | | x | |
| Tonga | | | |
| Trinidad and Tobago | | x | x |
| Tunisia | | x | x |
| Turkey | | | x |
| Turks and Caicos Islands* | | | x |
| Uganda | | | |
| Union of Soviet Socialist Republics | | x | x |
| United Arab Emirates | | | x |
| United States | | | |
| Viet Nam | | x | x |
| Yemen (Arab Republic) [North Yemen] | | | |
| Yemen (People's Democratic Republic) | | x | x |
| [South Yemen] | | | |
| Yugoslavia | x | | x |
| Zaire | x | | x |
| Zambia | x | | x |
| Zimbabwe | | | |
| Total: 126 countries and territories | | | |

COUNTRIES WHICH HAVE ABOLISHED THE DEATH PENALTY SINCE 1975

(In recent years, at least one country a year has abolished the death penalty in law or, having done so for ordinary offenses, has gone on to abolish it for all offenses.)

1975: Mexico abolished the death penalty for ordinary offenses.

1976: Canada abolished the death penalty for ordinary offenses.

1976: Portugal abolished the death penalty for all offenses.

1978: Spain abolished the death penalty for ordinary offenses.

Denmark abolished the death penalty for all offenses.

1979: Luxembourg, Nicaragua and Norway abolished the death penalty for all offenses.

Brazil¹ and Fiji abolished the death penalty for ordinary offenses.

1980: Peru abolished the death penalty for ordinary offenses.

¹ Brazil had abolished the death penalty in 1882 but reintroduced it in 1969 while under military rule.

1981: France abolished the death penalty for all offenses.

1982: The Netherlands abolished the death penalty for all offenses.

1983: Cyprus and El Salvador abolished the death penalty for ordinary offenses.

1984: Argentina² and Australia abolished the death penalty for ordinary offenses.

1985: Australia abolished the death penalty for all offenses.

1987: Haiti, the German Democratic Republic, Lichtenstein and the Philippines abolished the death penalty for all offenses.

Moves to reintroduce the death penalty have been defeated in a number of countries in recent years.

² Argentina had abolished the death penalty for all offenses in 1921 and again in 1972 but reintroduced it in 1976 following a military coup.